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No. 08-610

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF LAS CRUCES,
CINDY MCCANTS and NATHAN KRAUSE,

Petitioners,

v.

JOHN G. VONDRAK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	1
EXCESSIVE FORCE RULINGS	3
CONSIDERATION GOVERNING REVIEW ON CERTIORARI	5
REASONS FOR DENYING THE WRIT	5
I. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT	5
II. THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT	6
III. THE TENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S RELEVANT DECISIONS	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

Amendment IV ..... *passim*

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 7, 10

Bisbee v. Bey, 39 F.3d 1096 (10th Cir. 1994), cert. denied, 515 U.S. 1142 (1995) 12

Brousseau v. Haugen, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) 7, 8

Cortez v. McCauley, 478 F.3d 1108 (10th Cir. 2007) 4, 9, 10

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ..... *passim*

Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005) 5

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) 6, 7, 8, 11

United States v. Hensley, 460 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) 10

Vance v. Wade, 07-5930 (6th Cir. 11-17-08) 6

Vondrak v. City of Las Cruces, 535 F.3d 1198 (10th Cir. 2008) 4

Youngblood v. West Virginia, 547 U.S. 867 (2006) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

42 U.S.C. § 1983 3

RULES OF THE UNITED STATES SUPREME COURT

Rule 10, Consideration Governing Review on Certiorari.....5, 6, 12

INTRODUCTION

The Petitioners take a restricted view of the evidence presented to the Tenth Circuit in order to make the legal argument that the Tenth Circuit's decision is inconsistent with prior decisions of this Court. Petitioners then rely upon a strained interpretation of this Court's prior decisions to urge the proposition that the arresting officers are entitled to qualified immunity.

Petitioners present no compelling reasons for the Court to grant their Petition for a Writ of Certiorari. The Tenth Circuit consistently and correctly applied this Court's existing decisions to the facts of Respondent's case. The Tenth Circuit's decision does not conflict with decisions entered by other circuits in similar handcuffing cases.

Also, this Court's existing decisions do provide adequate guidance to courts of lesser federal jurisdiction on how to decide cases of this type. Complaints about the use of excessive force in the application of handcuffs during the arrest process do not raise new or novel questions of constitutional law.

COUNTER-STATEMENT OF THE CASE

The case concerns a United States Citizen who was stopped at a sobriety checkpoint that was not equipped with breath testing equipment. The citizen, John Vondrak, was detained and subjected to field

sobriety testing because he admitted to drinking a single beer three hours prior to his stop. Appendix, page 3.

Respondent Vondrak was arrested, handcuffed and taken into custody for allegedly failing the field sobriety tests. Appendix, pages 7-9. He immediately complained that the handcuffs were too tight and were hurting him. Respondent was transported to a police station where four breath tests were administered to determine his blood alcohol level. He complained while in transit to the police station that the handcuffs were too tight and were hurting him. The test results showed that he had zero blood alcohol content. Appendix, page 7. John Vondrak was kept in handcuffs in a jail cell and detained for an additional 1½ hours before being ticketed and released.[1]

Respondent continued to complain during his detention that his wrists hurt and that the handcuffs were too tight. He was taken to a hospital upon release for treatment for visible wrist injuries. The police took photographs of his wrists prior to his release and his wrists appeared red in the photographs. Appendix, page 7. Doctors found that the handcuffing caused him a permanent nerve injury to his wrists. Appendix, page 8.

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[1] The police issued him a traffic ticket for being slightly inebriated. This ticket was dismissed by a municipal court judge. Appendix, page 8.

The citizen brought action under 42 U.S.C. § 1983 in the United States District Court for the District of New Mexico against the City of Las Cruces, and the arresting and back-up police officers for violation of his civil rights. Petitioners raised the defense of qualified immunity, moved for summary judgment, and dismissal of his action.

The District Court denied summary judgment on the illegal arrest and the excessive force claims. Petitioners appealed the denial to the Tenth Court. A divided court held that Petitioners were entitled to sovereign immunity on the illegal arrest claim. The majority opined that it was a close question as to whether the arresting officer had probable cause for arrest. Appendix, page 19.

The Tenth Circuit was unanimous in its opinion that Petitioners were not entitled to summary judgment on Respondent's excessive force claims. Petitioners are applying to the United States Supreme Court for a Writ of Certiorari.

EXCESSIVE FORCE RULINGS

The New Mexico District Court ruled that courts must analyze claims that law enforcement officers used excessive force in the course of arrest or detention under the Fourth Amendment's reasonableness standard espoused in *Graham v. Connor*, 490 U.S. 386 (1989).

The District Court recognized that the Fourth Amendment's reasonableness test is not capable of precise definition or mechanical application. Its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting arrest or attempting to evade arrest by flight. Appendix, page 53.

The District Court also referenced *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), for the proposition, that the Tenth Circuit expects a plaintiff to demonstrate "some actual injury that is not de minimis, be it physical or emotional" to establish excessive use of force. Appendix, page 55.

The Tenth Circuit held in a carefully worded published opinion that the district court correctly concluded that defendants were not entitled to qualified immunity on the Respondent's excessive force claim for being restrained by unduly tight handcuffs. *Vondrak v. City of Las Cruces*, 535 F.3d 1198 (10th Cir. 2008).

CONSIDERATION GOVERNING REVIEW ON CERTIORARI

Petitioners are expected to advance compelling reasons under Rule 10 for certiorari to be granted. Review is not a matter of right, but of judicial discretion. *Youngblood v. West Virginia*, 547 U.S. 867 (2006). Respondent believes that compelling reasons do not exist and that denial of the petition for certiorari is warranted.

REASONS FOR DENYING THE WRIT

POINT I

THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH A DECISION OF ANOTHER CIRCUIT

The Court may exercise its discretion and grant certiorari if a Petitioner is able to show that a United States Court of Appeals entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Rule 10(a).

Petitioners, however, admit in their petition that the Tenth Circuit's decision follows the trend of other circuit courts of appeals on this same important matter. Petition at page 10. Citing: *Lyons v. City of Xenia*, 417 F.3d 565, 575-76 (6th Cir. 2005). Also see the Tenth Circuit decision at Appendix, page 24.

The Sixth Circuit and the Tenth Circuit hold that the Fourth Amendment's objective reasonableness

standard is satisfied if the Plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored his timely complaints (or was otherwise made aware) that the handcuffs were too tight. Cf. *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

Both circuits place a duty upon a police officer to investigate timely complaints about unduly tight handcuffs and take action when warranted by the circumstances. No circuit condones police inaction because to do otherwise would render a citizen's rights under the Fourth Amendment meaningless. *Vance v. Wade*, 07-5930 (6th Cir. 11-17-08).

Petitioners are really saying that the Tenth Circuit and other circuits are evaluating handcuffing claims consistently with this Court's decisions. Police action must be objectively reasonable; frivolous lawsuits are discouraged.

POINT II

THE TENTH CIRCUIT DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

The Court may exercise its discretion under Rule 10(c) and grant certiorari if a Petitioner is able to show that a United States Court of Appeals has decided an important federal question in a way that conflicts with its *relevant* decisions.

The Petitioners urge that proposition at Page 6 of its Petition and allege that the Tenth Circuit decision conflicts with the decisions in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) and *Graham v. Connor*, 490 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) and *Brousseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004).

Relevancy of a decision is, of course, of prime consideration. Respondent does not consider *Anderson v. Creighton* to be relevant to the legal and factual issues presented to the Tenth Circuit for determination in his case.

Anderson v. Creighton, supra, concerns an FBI agent who was sued because he conducted a warrantless search under the authority of a statute that was later declared to be unconstitutional. The court ruled that he was entitled to qualified immunity because he was entitled to rely upon the validity of a statute in effect when the warrantless search was conducted.

Anderson v. Creighton, supra, is not factually relevant to Respondent's case because Petitioners are not being sued for actions taken under the authority of a law or statute that was later declared constitutionally invalid.

Brousseau v. Haugen, supra, is also not considered relevant because Respondent's case does not fall into the *handful* of excessive force cases factually

categorized as lying in the "hazy border between excessive and acceptable force." *Brousseau v. Haugen* concerns a disturbed felon who was intent on resisting arrest and fleeing from capture in an automobile.

The police officer shot the fleeing suspect because he posed a threat to innocent bystanders as well as police officers. This Court granted the police officer qualified immunity and cited *Saucier v. Katz*, supra, for the proposition that police action was objectively reasonable given the situation facing the officer at the time action was taken. The officer involved in the shooting did not have *fair notice* that her conduct was unlawful.

Respondent did nothing on the occasion of his arrest to pose a threat to the safety of the public or any police officer. He was not a felon trying to escape from or resist arrest. He did not pose a threat to officer safety while he was kept handcuffed in a jail cell. Also, his numerous complaints that his wrists were hurting gave the police officers fair notice that their conduct regarding the manner of handcuffing was unlawful.

Certiorari should be denied because Petitioners cannot show that the Tenth Circuit decided an important federal question in a way that conflicts with a relevant decision of this Court, and Petitioners admit as much at Page 9 of the Petition.

Petitioners are unable to cite a case in which this Court granted qualified immunity to a police

officer involving a factual situation remotely similar to Respondent's case.

POINT III

THE TENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S RELEVANT DECISIONS

The Tenth Circuit was required to decide if: (1) The right to be free from unduly tight handcuffing was clearly established at the time police action was taken, (2) Respondent's Fourth Amendment rights were violated by the manner of his handcuffing, and (3) And, if the police officers were put on notice that their conduct was unlawful.

The Tenth Circuit explained the basis for and standard of review for an appeal from a denial of qualified immunity. The conclusion to be drawn from a reading of the decision is that this Court's relevant decisions were justly and correctly applied.

(1)

At the time of Respondent's arrest, the right to be free from unduly tight handcuffing was clearly established. See: Tenth Circuit decision, Respondent's Appendix, page 24. The Tenth Circuit, in making this finding relied upon its decision in *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007).

Cortez v. McCauley, supra, in turn, was based upon, *United States v. Hensley*, 460 U.S. 221, 235, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985), which essentially held that police officers effecting an arrest should know that they are permitted to use only as much force as necessary to secure their own safety and maintain the status quo.

Petitioners' reliance upon *Anderson v. Creighton*, supra, is misplaced if they are citing the case for the proposition that police officers do not know that they are only allowed to use that amount of force that is reasonable and necessary to affect an arrest.

No one should have difficulty with the general proposition that police officers know that they are only allowed to employ reasonable and necessary force in affecting an arrest. In any event, in the specific case, such questions are factual, not capable of precise definition, and are resolved under the objective reasonableness standard espoused in *Graham v. Connor*.

(2)

The Tenth Circuit's decision, as previously indicated, is consistent with this Court's holding in *Graham v. Connor* which involved excessive force used by a police officer in the course of making an investigatory stop of an innocent citizen.

This Court ruled that the lawfulness of the police officer's conduct under the Fourth Amendment should

be judged by the objective reasonableness of his actions at time of arrest and not by the police officer's subjective intent.

The Tenth Circuit cited *Graham v. Connor* in its decision and applied the objective reasonableness standard to the evidence presented in Respondent's case. The Tenth Circuit was unanimous that the factual record established a violation of the Respondent's Fourth Amendment right to be free from excessive use of force.

The lower courts did not limit their review of the evidence to those moments when the handcuffs were first applied which is what the Petitioners are asking this Court to accomplish for them in their petition for writ of certiorari.

(3)

The Tenth Circuit, consistent with this Court's holding in *Saucier v. Katz*, concluded that the police officers were not entitled to qualified immunity for Respondent's claim for unduly tight handcuffing. The focus of the inquiry was directed to whether the police had fair notice that their conduct was unlawful.

The Tenth Circuit made specific reference to the entire factual record and found that Respondent presented ample evidence that numerous complaints were made during the course of arrest and detention that the handcuffs were unduly tight, that his wrists

were hurting and going numb. See: Appendix, pages 6, 7 and 8.

The Tenth Circuit took cognizance of the fact that the police dispute being told by Respondent that his handcuffs were too tight. The summary judgment standard requires the evidence to be interpreted in a manner favorable to Respondent in the absence of a contrary ruling by judge or jury. *Bisbee v. Bey*, 39 F.3d 1096 (10th Cir. 1994), cert. denied, 515 U.S. 1142 (1995).

The Tenth Circuit also guided by a rule of reason that discourages frivolous lawsuits examined Respondent's evidence to determine if he sustained an actual injury from the handcuffing that was not de minimis. This ruling is consistent with *Graham v. Connor* which holds that "not every push or shove violates the Fourth Amendment."

Petitioners, on the other hand, only want this Court to focus on part of the factual record and rule on their petition as if only some of the evidence is worthy of consideration.

CONCLUSION

The Petition for Writ of Certiorari should be denied because Petitioners fail to set forth compelling reasons under Rule 10 for granting the writ. The Tenth Circuit's unanimous decision is consistent with this Court's relevant decisions and the underlying

purposes of qualified immunity in excessive force cases. Justice is not served by further delaying Respondent's day in court.

Respectfully submitted,

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